Supreme Court, U.S.
FILED

03 277 JUN 20 2003

No.

Supreme Court of the United States

Benoit Brookens,
Petitioner

v.

Federal Labor Relations Authority
Respondent

On Petition for Writ of Certiorari
To The District of Columbia Court of Appeals

Petition for Writ of Certiorari

Benoit Brookens, II, Esq.
Counsel of Record
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Washington, DC 20013-2551
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I. Questions Presented for Review

(1) Whether the Department of Labor, when it failed to file exceptions to a final arbitration award to restore an employee to full back pay and benefits, waived any objections it could have raised to enforcement of the award before the FLRA and the U.S. Court of Appeals, pursuant to 5 U.S. C. 7122 (c), except "the failure or excuse to urge the objection is excused because of extraordinary circumstances?"

(2) Whether the DC Circuit's holding—lack of jurisdiction—conflicts with the holding of that of another court, Department of Navy v. FLRA, 815 F.2d 797 (1st Cir. 1987) that the Federal appeals court has jurisdiction to determine whether the action of a federal agency constitutes an abuse of discretion within the meaning of the Administrative Procedure Act. 5 U.S.C. Art. 706(2)(A) as found in Citizen to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-16, 91 S.Ct. 814, 822-23, 28 L.Ed.2d 136 (1970)?

(3) Whether Congress, when it enacted standards for judicial review of federal administrative actions pursuant to Section 5 U.S.C. 706 of the Administrative Procedures Act, intended to exempt "delegated" decisions of the Federal Labor Relations Authority 5 U.S.C. 7122 (c)?

II. List of Parties

Benoit Brookens

American Federation of Government Employees (AFGE), Local 12, (AFL-CIO)

U.S. Department of Labor

Federal Labor Relations Authority (FLRA)

III. Corporate Disclosure Statement

This case does not involve any corporations or their affiliates.

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Citations of the Official and the Unofficial Reports and Orders in the Case

There are no official or unofficial reports and orders in this case.

V. Petition

A. Statement of the Basis for Jurisdiction

i) The Order, the subject of the petition, was entered on January 3, 2003.

ii) The orders denying rehearing and rehearing en banc were entered March 26, 2003.

iii) Statutory Provision providing Jurisdiction of this Court: 5 U.S.C. 7123 (c)

iv) Notification pursuant to Rule 29.4(b) are provided to:

Solicitor General of the United States,
Room 5614,
Department of Justice,
950 Pennsylvania Avenue, NW,
Washington, DC 20530-0001

James Blanford, Esq.,
Counsel for the Federal Labor Relations Authority,
607 14th Street, NW,
Washington, DC 20424-6620

(B) Statutory Provisions

5 U.S.C. 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or other wise not in accordance with law;

5 U.S.C. 7122. Exceptions to arbitral award

(b) If no exception to an arbitrator's award is filed under section (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in Section 5596 of this title).

5 U.S.C. 7123 Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than a order under—

(1) section 7112 of this title (involving an award of an arbitrator)..., or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States Court of Appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under section (b) of this section for enforcement, the Authority shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served on the parties involved, and thereupon shall have jurisdiction of the proceeding and the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) of (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 [the Administrative Procedures Act 5 U.S.C. 706] of this title. No objection

that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances...

Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(C) Statement of the Case

In a federal employee arbitration, the arbitrator ordered that a 20 day suspension be "rescinded and expunged" from the grievant's record and the grievant made whole, including interest "for the difference between what he earned and what he would have earned."

The Agency, the U.S. Department of Labor, failed to file exceptions to the award within the prescribed 30 day period and failed to implement the award as ordered. The employee filed an Unfair Labor Practice (ULP) to enforcement the award with the Federal Labor Relations Authority (FLRA). The FLRA's General Counsel, contrary to long standing precedence failed to enforce the arbitration award, and dismissed the employee's petition. The employee sought review of the FLRA's action before the D.C. Court of Appeals pursuant to 5 U.S.C. 706 as arbitrary and capricious. The Appellate Court dismissed the employee's appeal for "lack of jurisdiction" and the employee seeks review before this Court.

(D) Reasons for Granting Review

The Federal Labor-Relations statute[1]—in lieu of authorizing federal worker's the right to strike—provides for mandatory implementation of arbitration awards by federal agencies. Failure of the FLRA to enforce unexcepted arbitration decisions, subverts Congressional intent and undermines the entire federal employee labor-management dispute resolution system which is based upon binding arbitration. In the absence of this Court's review of the FLRA's action, through its designee, the General Counsel, failing to require enforcement of the arbitration award, in derogation of a long line of cases to the contrary, would sanction arbitrary and capricious agency action and abdicate judicial review long established in Citizen to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-16, 91 S.Ct. 814, 822-23, 28 L.Ed.2d 136 (1970).

(E) Argument

(1) *THE LABOR DEPARTMENT MAY NOT RAISE OBJECTIONS TO ENFORCEMENT NOT RAISED IN EXCEPTIONS.*

The only objection—to enforcement of the arbitral award--the Labor Department is allowed by statute is that "the failure or neglect to urge the objection is excused because of extraordinary circumstances", 5 U.S.C. 7123. In this case, the Labor Department failed to argue any extraordinary circumstances before the FLRA and therefore, is barred from raising any other objection before the U.S. Court of Appeals. The language of the statute is quite clear and unambiguous:

---

[1] Federal Service Labor-Management Relations Statute, 5 U.S.C. Arts. 7101-735 (1982 & Supp. III 1985)

> No objection that has not been urged before the Authority, or its designee, shall be considered by the court "unless the failure or neglect to urge the objection is excused because of extraordinary circumstances."

The FLRA, has determined, during Unfair Labor Practice (ULP) proceedings, that an agency's failure to file exceptions to an arbitration award and its failure to implement that award to, in effect, constitute an unfair labor practice. Soldiers' and Airmen's Home and AFGE local 3090, 15 FLRA 139 (1984).

The U.S. Court of Appeals, First Circuit, according to the FLRA Guide, (p. 1898, 1999 Ed.) provides the following;

> The Authority's rule concerning the effect of a failure to file exceptions appears to have been adopted in court, although the court may review the subsequent ULP ruling by the Authority to remedy the failure by the agency to abide by an unexcepted award. Department of Navy v. FLRA, 815 F.2d 797 (1st Cir. 1987).

The FLRA Guide further cites that "If timely exceptions are not filed, the objections will not be entertained as a defense to a ULP proceeding brought to enforce the award. Dept. of Navy, Naval Submarine Base, New London and NAGE Local R-1-100, 19 FLRA 250 (1985)."

For the FLRA and the court to now entertain objections after the Labor Department failed to timely file exceptions to the arbitration award is contrary to the mandates of the statute.

(2) ***THE D.C. COURT'S HOLDING OF LACK OF JURISDICTION CONFLICTS WITH 5 U.S.C. 7122.***

The controlling code provision concerning jurisdiction in this matter is 5 U.S. C. 7122:

> Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

For the Appeals Court, to find otherwise —in contravention of the statute—is error.

To the contrary, the First Circuit found that it had jurisdiction to determine whether the action of the agency constituted an abuse of discretion within the meaning of 5 U.S.C. 706 and provided for in 5 U.S.C. 7122 (c)[2].

[2] Has the employee objected to the arbitration award and filed exceptions or had the Agency done likewise, this matter would before the Court of Appeals on the merits.

(3) *THE CONGRESS DID NOT EXEMPT THE FLRA FROM THE JUDICIAL REVIEW PROVISIONS OF 5 U.S.C 706(2)(a) OF THE ADMINISTRATIVE PROCEDURES ACT.*

The Congress did not expressly exclude the FLRA from the Administrative Procedures Act and, therefore, via a reasonable construction of statutory language, is included in its coverage. The reviewing appeallate court, therefore, then has the authority to perform the following:

> (2) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (3) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> > (A) arbitrary, capricious, an abuse of discretion, or other wise not in accordance with law;

On these grounds, the employee requests that this petition for certiorari be granted.

VI. APPENDIX

Orders

United States of America
FEDERAL LABOR RELATIONS AUTHORITY
607 14th Street NW Washington, DC 20424-0001
(202)482-6600 Fax: (202)482-6608

July 9, 2002

OFFICE OF THE GENERAL COUNSEL

Mr. Benoit Brookens
P.O. Box 2551
Washington, DC 20013-2551

Re: U.S. Department of Labor
Washington, DC
Case No. WA-CA-01-0555

Dear Mr. Brookens:

Your appeal of the dismissal of the unfair labor practice charge in this case by the Washington Regional Director has been carefully considered.

Your appeal has been denied because the appeal has failed to establish that: (1) the Regional Director's decision did not consider material facts that would have resulted in issuance of a complaint; (2) the Regional Director's decision is based on a finding of a material fact that is clearly erroneous; (3) the Regional Director's decision is based upon an

incorrect statement of the applicable rule of law; (4) there is no Authority precedent on the legal issue in the case; or (5) the manner in which the Region conducted the investigation has resulted in prejudicial error.

The appeal has established no ground for reversing the Regional Director's decision or remanding the case for further investigation in accordance with section 2423.11(e) of the General Counsel's regulations. The dismissal letter issued by the Regional Director constitutes the written statement of reasons for not issuing a complaint as required by sectin 7118(a)(1) of the Federal Service Labor-Management Relations Statute. The Regional Director's reason for not issuing a complaint are hereby affirmed. Your appeal is denied and the case closed.

For the General Counsel.

Sincerely yours,

/s/ Richard Zorn
Richard Zorn
Assistant General Counsel
for Appeals

cc: Regional Director, Washington

Laura Stomski, Agency Representative, Labor-Management Relations Center, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5470, Washington, DC 20210

UNITED STATES COURT OF APPEALS
For the District of Columbia

No. 02-1281 September Term, 2002

Benoit Brookens, Petitioner
v.
Federal Labor Relations Authority Respondent

Filed on: (Seal File Jan 3, 2003 Clerk)

BEFORE: Ginsburg, Chief Judge; Sentelle and Randolph, Circuit Judges

ORDER

Upon consideration of the motion to dismiss, the court's order to show cause filed November 15, 2002 and the opposition to the motion to dismiss, it is
ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the motion to dismissed is granted. This court lacks jurisdiction to review the General Counsel's decision not to issue an unfair labor practice complaint. See Patent Office Professional Association v. FLRA, 128 F.3d 751 (D.C. Dir. 1997); Turgeon v. FLRA, 677 F.2d 937, (D.C. Cir. 1982)

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition of rehearing en banc. See Fed. R. App. P.41(b); D.C. Cir Rule 41.

Per Curiam

UNITED STATES COURT OF APPEALS
For the District of Columbia

No. 02-1281 September Term, 2002

Benoit Brookens,
Petitioner
v.
Federal Labor Relations Authority
Respondent

Filed on:
(Seal
March 26, 2003
Clerk)

BEFORE: Ginsburg, Chief Judge; Sentelle and Randolph, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing filed February 19, 2003, it is ORDERED that the petition be denied.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk
BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia

No. 02-1281 September Term, 2002

Benoit Brookens,
Petitioner
v.
Federal Labor Relations Authority
Respondent

Filed on:
(Seal
March 26, 2003
Clerk)

BEFORE: Ginsburg, Chief Judge; Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is
ORDERED that the petition be denied.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk
BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

Respectfully submitted this 19th day of August 2003,

Benoit Brookens, Esq.
Counsel of Record
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Supreme Court, U.S.
FILED
OCT 21 2003
OFFICE OF THE CLERK

(2)

No. 03-277

In the Supreme Court of the United States

BENOIT BROOKENS, II, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY IN OPPOSITION

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QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction under 5 U.S.C. 7123(a) to review a determination by the General Counsel of the Federal Labor Relations Authority not to issue an unfair labor practice complaint.

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In the Supreme Court of the United States

No. 03-277

BENOIT BROOKENS, II, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 5-6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2003. A petition for rehearing was denied on March 26, 2003 (Pet. App. 7-8). The petition for a writ of certiorari was filed on June 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Service Reform Act of 1978 (CSRA or the Act), Pub. L. No. 95-454, 92 Stat. 1191 (5 U.S.C. 7101 *et seq.*), governs labor relations between federal agencies and their employees. The Act estab-

lishes the Federal Labor Relations Authority (FLRA or Authority), a three-member bipartisan body within the executive branch, which serves a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. 5 U.S.C. 7104; *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Auth.*, 464 U.S. 89, 92-93 (1983). The CSRA requires the FLRA to supervise the collective bargaining of federal employees and to administer other aspects of federal labor relations, including the adjudication of unfair labor practice complaints, negotiability disputes, bargaining unit issues, arbitration exceptions, and representational election matters. 5 U.S.C. 7105(a)(1) and (2); see *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Auth.*, 464 U.S. at 92-93.

The General Counsel of the FLRA acts as the body's enforcement arm. The Act provides that the General Counsel shall investigate any allegation that a labor organization or federal agency engaged in an unfair labor practice and that he "may issue and cause to be served upon the agency or labor organization a complaint." 5 U.S.C. 7118(a)(1). The Act does not otherwise limit the discretion of the General Counsel in his decision whether or not to issue an unfair labor practice complaint.

2. This case concerns a decision by the General Counsel of the FLRA not to issue an unfair labor practice complaint.

a. At all times relevant to this action, petitioner Benoit Brookens, II, was employed as an International Economist with the International Labor Affairs Bureau (ILAB) of the Department of Labor (Department). Petitioner also held the position of Chief Steward of his union, the American Federation of Government Employees, Local 12. Opinion & Award 4 (Award).

In January 2000, petitioner's second-line supervisor recommended that petitioner be suspended for ten days for "(1) Failure to Follow Supervisory Instructions" and "(2) Insubordination." Award 4-5. This recommendation followed a three month dispute between petitioner and ILAB management over the use of internal office space. During that time, petitioner repeatedly refused to remove materials he had placed in a vacant office, and indeed replaced those materials after they were removed by management, even after being directly ordered to vacate the office by at least two supervisors. *Id.* at 5-12. Petitioner believed that as Union Steward, he had the right to claim a second office for himself unilaterally. *Id.* at 11. The day after proposing a ten-day suspension for this behavior, petitioner's second-line supervisor rescinded the proposal and issued a new proposal to suspend petitioner for 20 days. *Id.* at 13.

Petitioner, through his union representative, protested the sanction. An arbitrator was appointed to hear the matter pursuant to the terms of the parties' collective bargaining agreement. Award 13-14. The arbitrator found that petitioner's conduct "was flagrant and went far beyond what was justified in order to carry out his legitimate union activities." *Id.* at 24. However, considering the ten factors laid out in *Douglas* v. *Veterans Administration*, 5 M.S.P.B. 313 (1981), the arbitrator overturned the twenty-day suspension, finding it "excessively harsh." Award 27. Under the ten factors, the arbitrator found that a ten-day suspension would be "for such cause as would promote the efficiency of the Service." *Id.* at 30. Accordingly, a ten-day suspension was sustained. *Id.* at 31.

Following this decision, the Department compensated petitioner for ten days of pay, plus interest. Petitioner, however, interpreted the award to mean that all 20 days of his suspension were nullified, and demanded back pay and interest for the full 20 days. When the Department demurred, petitioner filed an unfair labor practice charge with the FLRA's Regional Office in Washington, D.C., asking the General Counsel to file an unfair labor practice complaint against the Department. Letter from Michael W. Doheny, Regional Director, Federal Labor Relations Auth., to Benoit Brookins regarding decision in Case No. WA-CA-01-0555, at 1-2 (Sept. 14, 2001) (Regional Director's Letter).

The Regional Director determined that issuance of a complaint was not warranted. Regional Director's Letter at 1. Specifically, the Regional Director found that "the evidence is insufficient to establish that the [Department] violated the Statute as alleged." *Id.* at 2. Petitioner appealed the Regional Director's decision to the General Counsel of the FLRA. The General Counsel determined that the appeal "established no ground for reversing the Regional Director's decision or remanding the case for further investigation." Letter from Richard Zorn, Assistant Gen. Counsel for Appeals, Federal Labor Relations Auth., to Benoit Brookins regarding denial of appeal in Case No. WA-CA-01-0555, at 1 (July 9, 2002). Therefore, the General Counsel denied the appeal and closed the case. *Id.* at 1.

b. Invoking 5 U.S.C. 7123(a), petitioner sought review of the General Counsel's determination in the United States Court of Appeals for the District of Columbia Circuit. The FLRA moved to dismiss the petition for review for lack of subject matter jurisdiction. The court of appeals, citing *Patent Office Prof'l Ass'n*

v. *Federal Labor Relations Auth.*, 128 F.3d 751 (D.C. Cir. 1997), cert. denied, 523 U.S. 1006 (1998), and *Turgeon* v. *Federal Labor Relations Auth.*, 677 F.2d 937 (D.C. Cir. 1982), granted the motion and dismissed the petition for review. Petitioner's requests for rehearing and rehearing en banc were also denied. Pet. App. 7-8.

ARGUMENT

The court of appeals correctly determined that it was without jurisdiction to review decisions of the FLRA's General Counsel not to issue unfair labor practice complaints. This holding does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore not warranted.[1]

1. The court of appeals' dismissal of petitioner's petition for review is consistent with the language and history of the Act and the decisions of every other court of appeals to have addressed the question of appellate jurisdiction to review such decisions by the FLRA.

a. Section 7123(a) provides that "[a]ny person aggrieved by any final order of the [FLRA] * * * may * * * institute an action for judicial review of the [FLRA's] order in the United States court of appeals." 5 U.S.C. 7123(a). Section 7123 is the only provision of the CSRA that provides for judicial review of FLRA

---

[1] Petitioner has submitted a second petition for a writ of certiorari, dated August 19, 2003, containing an Administrative Procedures Act (APA) claim not presented in his original petition. Under Supreme Court Rule 13, the second petition is untimely and may not be filed. Alternatively, if the second petition is treated as a supplemental brief, Petitioner still may not raise the APA argument. Supreme Court Rule 15.8 restricts supplemental briefs to "intervening matter[s] not available at the time of the party's last filing." The APA claim was available at the time of petitioner's first submission to this Court; in fact, petitioner made this claim unsuccessfully in the lower court.

orders. However, the power to issue unfair labor practice complaints rests exclusively in the FLRA's General Counsel, not in the FLRA itself. 5 U.S.C. 7118(a)(1). Because the CSRA allows only for review of final orders of the FLRA, and the FLRA has no power to issue unfair labor practice complaints or review the General Counsel's decisions not to do so, the Act cannot properly be read to allow review of the General Counsel's decision not to issue an unfair labor practice complaint.

b. The conclusion that decisions by the FLRA General Counsel to file (or not file) unfair labor practice complaints are unreviewable is further supported by the history of the Act. In *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967), this Court found that "the [NLRB's] General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint." Congress passed the CSRA against this background, explicitly proclaiming an intent to fashion the FLRA as a public sector analogue to the NLRB and to allocate authority between the FLRA and its General Counsel in the same manner as the NLRB and its General Counsel. See S. Rep. No. 969, 95th Cong., 2d Sess. 102 (1978) ("The General Counsel is intended to be autonomous in investigating unfair labor practice complaints * * *. Specifically, the Authority would neither direct the General Counsel concerning which unfair labor practice cases to prosecute nor review the General Counsel's determinations not to prosecute, just as the National Labor Relations Board does not exercise such control over its General Counsel."); H.R. Rep. No. 1403, 95th Cong., 2d Sess. 42 (1978) ("The committee intends that the General Counsel be analogous in role and function to the General Counsel of the [NLRB]."); see also *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor*

Relations Auth., 464 U.S. at 92-93. Given that *Vaca* was well-established precedent at the time that Congress decided to endow the FLRA's General Counsel with authority parallel to that of the NLRB's General Counsel, Congress clearly intended that the General Counsel's decisions regarding unfair labor practice complaints would be unreviewable.

c. Several courts of appeals have specifically examined the question of whether they can review a decision of the FLRA's General Counsel not to issue an unfair labor practice complaint, and each has concluded that it was without subject matter jurisdiction to review such a decision. See *Rizzitelli* v. *Federal Labor Relations Auth.*, 212 F.3d 710, 712-713 (2d Cir. 2003) ("It was the General Counsel, therefore, not the Authority, that made the final decision not to issue a complaint on petitioner's unfair labor practice charge. There is thus no 'final order of the Authority.'"); *Patent Office Prof'l Ass'n* v. *Federal Labor Relations Auth.*, 128 F.3d at 753 ("[A] decision of the General Counsel of FLRA not to file a complaint is not judicially reviewable given that the statute provides for review only of decisions of the Authority."); *American Fed'n of Gov't Employees, Local 1749* v. *Federal Labor Relations Auth.*, 842 F.2d 102, 105 (5th Cir. 1988) (per curiam) ("[T]he Authority's General Counsel has a role similar to that of a prosecutor, and his decision not to prosecute puts an end to the matter and is not reviewable, irrespective of the merits of the underlying unfair labor practice assertions."); *Martinez* v. *Smith*, 768 F.2d 479, 480 (1st Cir. 1985) ("[C]ourts have no jurisdiction to review a decision of the FLRA to refuse to issue an unfair labor practice complaint."); *Turgeon* v. *Federal Labor Relations Auth.*, 677 F.2d at 938 ("The Act affords the Authority no opportunity to review a decision of the General

Counsel declining to issue an unfair labor practice complaint—it is only upon the issuance of a complaint by the General Counsel that the Authority is empowered to exercise its decision-making functions."); *Columbia Power Trades Council* v. *United States Dep't of Energy*, 671 F.2d 325, 329 (9th Cir. 1982) ("There is no provision in [Section] 7118 for review in the courts of this determination."). Petitioner offers no authority for the proposition that the General Counsel's exercise of his discretion not to issue an unfair labor practice complaint may be construed as a "final order of the Authority," and does not otherwise offer any reason to abandon the courts of appeals' settled interpretation of the Act's judicial review provision.[2]

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[2] Although not cited by petitioner, the Ninth Circuit, relying on a footnote in this Court's decision in *Heckler* v. *Chaney*, 470 U.S. 821, 833 n.4 (1985), once stated that the General Counsel's determination not to issue a complaint is only "presumptively" unreviewable. *Montana Air Chapter No. 29* v. *Federal Labor Relations Auth.*, 898 F.2d 753, 756 (9th Cir. 1990). The Ninth Circuit adopted the view that a decision not to exercise enforcement authority is reviewable when the decision is based either on the agency's conclusion that it lacked jurisdiction or on a general policy "so extreme as to amount to an abdication of its statutory responsibilities." *Ibid.* (quoting *Heckler*, 470 U.S. at 833 n.4).

Montana Air did not purport to distinguish the Ninth Circuit's earlier conclusion in *Columbia Power Trades Council* that "[t]here is no provision in § 7118 for review in the courts of [the General Counsel's enforcement] determination." 671 F.2d at 329. To the extent that the Ninth Circuit's decision in *Montana Air* created an intra-circuit conflict, it is not a basis for an exercise of this Court's certiorari jurisdiction. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

In any event, even *Montana Air* fails to provide a basis for jurisdiction in this case. Nothing in the record suggests that the General Counsel either believed he lacked jurisdiction to issue unfair labor practice complaints in response to petitioner's allega-

2. Although petitioner contends that the order of the court of appeals presents constitutional questions, petitioner never articulates how the General Counsel acted in derogation of petitioner's constitutional rights. What petitioner does present is largely a request for error correction. In this regard, the petition cites several cases for the proposition that an agency which does not object to an arbitrator's award must implement that award. First, these citations are not on point. The issue at hand is not whether or not the Department of Labor committed an unfair labor practice; the question is whether or not a court of appeals has jurisdiction to review the FLRA General Counsel's determination that no unfair labor practice has been committed.

More fundamentally, petitioner's contentions amount to nothing more than a disagreement with the legal reasoning and factual findings of the General Counsel. Petitioner maintains that the arbitrator meant to vacate the entirety of his 20-day suspension. The Regional Director disagreed, and petitioner takes issue with that disagreement. However, where, as here, judicial review of agency action is precluded, allegations of legal or factual error are insufficient to confer jurisdiction. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964) (exception to preclusion of judicial review should "not * * * be extended to permit plenary district court review of [NLRB] orders * * * whenever it can be said that an erroneous assessment of the par-

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tions, or that the General Counsel otherwise had adopted a general policy of non-enforcement that amounted to an abdication of his statutory responsibilities. Here, the General Counsel investigated petitioner's allegations and decided not to file an unfair labor practice complaint after determining that the allegations lacked merit.

ticular facts * * * has led it to a conclusion which does not comport with the law").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 03-277 (3)

Supreme Court of the United States

Benoit Brookens,
Petitioner

v.

Federal Labor Relations Authority
Respondent

On Petition for Writ of Certiorari
To The District of Columbia Court of Appeals

Petitioner's Reply Brief

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6 pp

The FLRA Mis-stated the Terms of the Award and Redefined the Problem

The FLRA has (1) factually mis-stated the plain language of the Arbitrator's award and (2) redefined the problem—its failure under the Federal Labor-Management Relations statute, 5 U.S.C. 7122(b), to require the Labor Department to comply with the terms of the arbitration award.

(A) **The FLRA Mis-Read the Remedy Ordered by the Arbitrator**

The Arbitration award in United Stated Department of Labor and American Federation of Government Employees, Local 12, ARB-00-07 rendered by impartial arbitrator Suzanne Butler on December 7, 2000 and sought to be enforced by the employees provides the following:

AWARD

I. The twenty (20) day suspension of the Grievant was not for such cause as would promote the efficiency of the Service. As remedy, the twenty (20) day suspension shall be rescinded and expunged from the Grievant's record. The Grievant shall be made whole, including interest, for the difference between what he earned and what he would have earned, but for the violation of the Agreement found in this matter.

(B) The General Counsel's Conduct is an Abdication of its Statutory Duties

Both the FLRA, in its Opposition (p. 8 footnote 2), and the Employee, in his U.S. Court of Appeals Brief for Rehearing and or Rehearing in Banc (p.2) recognize that agency conduct "so extreme as to amount to an abdication of its statutory responsibilities" (quoting Hechler, 470 U.S. at 833 n. 3) would be judicially reviewable.

The FLRA contends "[t]o the extent that the Ninth Circuit's decision in Montana Air created a intra-circuit conflict, it is not a basis for an exercise of this Court's certiorari jurisdiction." However the employee sees Montana Air, from the 9th Circuit, and Department of Navy v. FLRA 815 F. 2d 797 (1st Cir. 1987), from the First Circuit, both operating to create inter-circuit conflicts concerning the very type of alleged arbitrary agency action judicial review contemplated in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-16, 91 S. Ct. 814, 822-23, 28 L.Ed.2d 136 (1970) sought to curtail. If any intra-circuit conflicts exist, it is within the D.C. Circuit.

The General Counsel, in its opposition, overlooked its statutory responsibility for the enforcement of 5 U.S.C. 7116(a)(1) and (8). As summarized in Walsh v. United States, 588 F. Supp. 523, at 527 (1983), provides that "Art. 7116(a)(8), which makes it an unfair labor practice 'to otherwise fail or refuse to comply with any provision of this chapter'"—included agency compliance with final arbitration awards.

The General Counsel, in its decision, failed to properly interpret 5 U.S.C. 7116(a)(1) and (8) and 7122(b) when it

failed to deny the Labor Department an indirect review of the arbitrator's Award.

> In our view, the purposes and policies of the Statute identified and discussed by the Authority and the courts in denying indirect review of the merits of an arbitration award in an unfair labor practice proceeding for refusing to comply with the award are best served in this case by enforcing the madate of section 7122(b): the [SSA] shall take the actions required by the Arbitrator's final award...[T]the [ALJ's opposite] approach has nothing to commend it in terms of the Statute's strong endorsement of arbitration as the preferred means of resolving labor disputes with dispatch and finality. SSA III, 41 F.L.R.A. at 768. Department of Health and Human Services v. FLRA, 976 F.2d 1409, 1413, (D.C. Cir. 1992)

In American Federation of Government Employees, AFL-CIO, Local 3090 v. FLRA 777 F.2d 751 (D.C. Cir 1985) the General Counsel took the necessary action to force agency compliance with the arbitration award. That decision provides the following:

> We agree with the petitioner that, absent a stay, the agency was obligated to comply with the arbitration decision, and that the dismissal of the unfair labor practice complaint was improper.

Although the agency, in AFGE Local 3090, eventually complied with the arbitration award, the institution of the unfair labor practice complaint by the FLRA General Counsel also had available additional sanctions that could be imposed on the agency for its failure to comply with the arbitration award as required by the statute.

Federal employees do not have recourse to U.S. District Courts as is available to employees in the private sector to enforce arbitration awards. For Federal employees, the power to enforce favorable employee arbitration awards lies exclusively within the domain of the FLRA General Counsel.

In this proceeding, if the ULP charges were not related to "enforcement of an arbitration award," perhaps the General Counsel's failure to prosecute would be "discretionary." However, as the sole enforcement arm for the federal employee arbitration enforcement system, the FLRA's General Counsel actions are ministerial—and it is bound by statute to perform them.

Had Congress intended for the enforcement of arbitration awards to be within the discretion of the FLRA General Counsel, Congress would not have included sections 5 U.S.C. 7116(a)(1) and (8) to encompass agency failure to comply with arbitration awards as"unfair labor practices" nor would it have included 5 U.S.C. 7122(b) to require agencies to "take the action required by an arbitrator's final award." Finally, if Congress wanted FLRA arbitration awards to be discretionary, Congress, when it enacted the FLRA statute, would have copied the NLRB enforcement mode in its entirety and provided arbitration award enforcement authority in U.S. District Courts.

For these reasons, the Employee prays that this petition is granted.

Respectfully submitted this 3rd day of November October 2003.

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